**WILLIAM JACKS & CO. (M) SDN. BHD.**

**v.**

**S BALASINGAM**

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABU MANSOR ALI JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-04-102-1995]
12 MAY 1996

***LABOUR LAW:*** *Industrial Court - Award - Award based on factual findings based on credibility of witnesses - Whether factual findings open to review by superior Courts - Whether certiorari lies*

***ADMINISTRATIVE LAW:*** *Remedies - Certiorari - Appeal against findings of fact - Whether Court may review factual findings of Industrial Court - Whether a reasonable tribunal similarly circumstanced would have come to a like decision*

***ADMINISTRATIVE LAW:*** *Exercise of judicial functions - Judicial review - Merits of decision, inquiry into - Whether confined to decisions of inferior tribunals being attacked in public law proceedings for unreasonableness - Or whether extends to review in certiorari proceedings of factual findings based on the credibility of witnesses - R Rama Chandran v. The Industrial Court of Malaysia & Anor. - Amanah Butler (M) Sdn. Bhd. v. Yike Chee Wah*

***LABOUR LAW:*** *Employment - Retrenchment - Meaning of - Whether retrenchment a bona fide exercise - Exercise of employer's managerial power - Whether immune from judicial review - Investigative powers and duties of Industrial Court*

This was an appeal against the refusal of the High Court to issue *certiorari* to quash an award of the Industrial Court which had been handed down in favour of the respondent. The respondent was initially employed as a fitter by the appellant in 1961 but was later appointed as a salesman. In 1977, the respondent was retrenched. In 1978, the respondent was re-employed as a bill collector. In 1989, the appellant purported to retrench the respondent again with an offer of RM27,000 as retrenchment benefits. The respondent refused the offer claiming that his purported retrenchment was a dismissal disguised as a redundancy exercise. The matter eventually went before the Industrial Court and the axis of the dispute between the parties was whether the

respondent had been dismissed without just cause or excuse or whether his discharge was a *bona fide* exercise of the managerial power vested in the appellant as an employer. After hearing the evidence of the witnesses, the Industrial Court concluded that the respondent had been victimised for his trade-union activities.

**Held:**
**Per Gopal Sri Ram JCA**

**[1]** It is well-settled that a Court **cannot** make use of *certiorari* proceedings as a cloak to entertain, what in truth is, an appeal against findings of **fact**. In the instant appeal, the appellant's complaints amounted to mere criticisms against the factual findings made by the Industrial Court based upon the credibility of the witnesses it saw and heard.

**[2]** Consequently, the High Court was entirely correct in refusing to enter upon a domain expressly reserved by the law for the Industrial Court and in refusing to issue *certiorari*.

**[3]** The decision of the Federal Court in *R Rama Chandran v. The Industrial Court of Malaysia & Anor.* and that of the instant Court in *Amanah Butler (M) Sdn. Bhd. v. Yike Chee Wah*, with their consequent inroads into the field of administrative law, establish the principle that when a decision of an inferior tribunal is attacked in public law proceedings for unreasonableness the inquiry extends to the **merits** of the decision itself. However, the proposition in these cases does **not** include the review, in *certiorari* proceedings, of findings of **fact** based on the **credibility of witnesses**. The question, at the end of the day, is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it.

**[4]** 'Retrenchment' has been defined as the discharge of surplus labour or staff by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action. Whether the retrenchment exercise in a particular case is *bona fide* or otherwise is a question of fact and of degree depending on the peculiar circumstances of the case. It is well-settled that the employer is entitled to organise his business in the manner he considers best. So long as the managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of the case to determine whether the exercise of power is in fact *bona fide.*

*[Appeal dismissed; order of High Court affirmed.]*

*[**Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG BURUH:*** *Mahkamah Perindustrian - Award - Award berasaskan keputusan faktual berdasarkan keboleh-percayaan saksi-saksi - Samada keputusan faktual terbuka untuk kajian semula oleh Mahkamah Agung - Samada terdapatnya certiorari*

***UNDANG-UNDANG PENTADBIRAN:*** *Remedi-remedi - Certiorari - Rayuan terhadap pendapat fakta - Samada Mahkamah boleh mengkaji semula keputusan fakta Mahkamah Perindustrian - Samada satu tribunal yang wajar dalam keadaan yang sama akan mencapai keputusan yang serupa*

***UNDANG-UNDANG PENTADBIRAN:*** *Perlaksanaan fungsi-fungsi kehakiman - Kajian semula kehakiman - Merit-merit keputusan, siasatan - Samada terhad kepada keputusan-keputusan tribunal bawahan dicabar dalam prosiding undang-undang awam kerana ketidakwajaran - Atau samada berlanjutan kepada kajian semula dalam prosiding-prosiding certiorari - Keputusan faktual berasaskan pada kebolehpercayaan saksi-saksi - R. Rama Chandra v. Mahkamah Perindustrian Malaysia & Yang lain - Amanah Butler (M) Sdn. Bhd. lwn. Yike Che Wah*

***UNDANG-UNDANG BURUH:*** *Pekerjaan - Pengurangan tenaga kerja - Maksud - Samada pengurangan tenaga kerja suatu pelaksanaan bona fide - Pelaksanaan kuasa pengurusan majikan - Samada kekebalan membentuk kajian semula kehakiman - Kuasa-kuasa siasatan dan tugas-tugas Mahkamah Perindustrian*

Ini adalah satu rayuan terhadap keengganan Mahkamah Tinggi untuk mengeluarkan *certiorari* bagi membatalkan award Mahkamah Perindustrian yang telah diberikan atas nama responden. Responden telah pada mulanya diambil bekerja sebagai jurugegas oleh perayu dalam tahun 1961 tetapi telah kemudiannya dilantik menjadi seorang jurujual. Dalam tahun 1977, perkhidmatan responden telah ditamatkan dalam usaha pengurangan tenaga pekerja. Dalam tahun 1978 perayu telah diambil bekerja semula sebagai seorang pemungut bil. Dalam tahun 1989, perayu bermaksud untuk sekali lagi menamatkan perkhidmatan responden dengan menawarkan sebanyak RM27,000 sebagai faedah-faedah pemberhentian. Responden telah menolak tawaran dengan menuntut bahawa penamatan beliau yang dikatakan itu adalah suatu pemecatan yang dilakukan disebalik suatu perbuatan yang berulangan. Perkara itu akhirnya telah dibawa ke hadapan Mahkamah Perindustrian dan paksi pertikaian antara pihak-pihak tersebut adalah samada responden telah dipecat tanpa alasan atau sebab yang adil atau samada pemberhentian adalah satu perlaksanaan *bona fide* kuasa-kuasa pengurusan yang terletak-hak pada perayu sebagai majikan.

Selepas mendengar keterangan saksi, Mahkamah Perindustrian telah memutuskan bahawa responden telah dijadikan mangsa untuk aktiviti-aktiviti kesatuan sekerjanya.

**Diputuskan:**
**Oleh Gopal Sri Ram HMR**

**[1]** Ianya jelas diketahui bahawa Mahkamah **tidak** boleh menggunakan prosiding *certiorari* sebagai selindung untuk melayan, apa yang sebenarnya, suatu rayuan terhadap keputusan fakta. Dalam rayuan ini, aduan perayu membawa kepada cemohan semata-mata terhadap pendapat-pendapat fakta yang dibuat oleh Mahkamah Perindustrian berdasarkan keboleh-percayaan saksi yang dilihat dan didengarnya.

**[2]** Akibatnya, Mahkamah Tinggi adalah sesungguhnya betul dalam menolak untuk memasuki satu domain yang secara nyatanya dikhaskan oleh undang-undang bagi Mahkamah Perindustrian dan dalam keengganan untuk mengeluarkan *certiorari.*

**[3]** Keputusan Mahkamah Persekutuan dalam *R. Rama Chandran v. The Industrial Court of Malaysia & Anor.* dan keputusan Mahkamah ini dalam *Amanah Butler (M) Sdn. Bhd. v. Yike Chee Wah,* dengan serangan yang diakibatkan ke dalam bidang undang-undang pentadbiran, menetapkan prinsip bahawa apabila sesuatu keputusan tribunal bawahan diserang dalam prosiding undang-undang awam kerana ketidak-wajaran, siasatan itu berlanjutan kepada merit-merit keputusan itu sendiri. Walaubagaimanapun, proposisi dalam kes ini tidak termasuk kajian semula, dalam prosiding *certiorari* mengenai keputusan fakta berdasarkan keboleh-percayaan saksi-saksi. Persoalannya, akhirnya, adalah samada satu tribunal yang wajar dalam keadaan yang sama akan mencapai keputusan yang sama berdasarkan fakta-fakta yang terdapat di hadapannya.

**[4]** "Pengurangan tenaga pekerja" telah ditafsirkan sebagai pelepasan tenaga kerja atau kakitangan yang berlebihan oleh majikan atas apa sebab sekalipun selain daripada sebagai hukuman yang dikenakan melalui tindakan tatatertib. Samada pelaksanaan pengurangan tenaga kerja dalam sesuatu kes adalah *bona fide* atau sebaliknya adalah persoalan fakta dan tahap yang bergantung pada keadaan khusus kes tersebut. Ianya jelas diketahui bahawa majikan berhak untuk mengelolakan perniagaannya menurut cara yang dia anggapkan terbaik. Asalkan kuasa pengurusan digunakan *bona fide,* keputusan tersebut adalah kebal daripada pemeriksaan walaupun oleh Mahkamah Perindustrian. Walaubagaimanapun, Mahkamah Perindustrian diberi kuasa dan sesungguhnya terikat oleh kewajipan untuk menyiasat

fakta-fakta dan keadaan-keadaan kes itu bagi menentukan samada pelaksanaan kuasa itu adalah pada hakikatnya *bona fide.*

*[Rayuan ditolak; perintah Mahkamah Tinggi diikrarkan.]*

**Cases referred to:**
*Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665* ***(cit)***
*R. Rama Chandran v. Industrial Court of Malaysia & Anor. [1997] 1 CLJ 147* ***(refd)***
*Basappa v. Nagappa AIR [1954] SC 440* ***(foll)***
*Dharangadhra Chemical Works Ltd. v. State of Saurashtra & Others AIR [1957] SC 264* ***(foll)***
*Amanah Butler (M) Sdn. Bhd. v. Yike Chee Wah [1997] 2 CLJ 79* ***(refd)***
*Hariprasad v. Divelkar AIR [1957] SC 121* ***(cit)***
*Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 748* ***(refd)***

**Legislation referred to:**
Industrial Relations Act 1967, s. 20(1)

*[Appeal from High Court Malaya, Kuala Lumpur; Originating Motion No: R2-25-8-94]*

*For the appellant - N. Sivabalah; M/s. Shearn Delamore & Co.*
*For the respondent - Loy Chee Say; M/s. Danker & Co.*

## JUDGMENT

**Gopal Sri Ram JCA:**

This is an appeal against the judgment of Azmel J in refusing to issue an order of *certiorari* to quash the Award of the Industrial Court which was handed down on 23 December 1993.

The facts relevant to the appeal are as follows.

The respondent was initially employed as a fitter by the appellant in August 1961. He was later appointed as salesman. In a retrenchment exercise in September 1977, the respondent was discharged. In January 1978, the respondent was re-employed as a bill-collector. On 24 October 1989, the appellant wrote to the respondent, informing him that he was being retrenched as bill-collector and offering retrenchment benefits of about RM27,000. The respondent did not accept the offer. He claimed that the retrenchment was a dismissal disguised as a redundancy exercise.

He, therefore, took advantage of s. 20(1) of the Industrial Relations Act and lodged a complaint with the Director General of Industrial Relations. In due

course, after the conciliation mechanism provided by s. 20 had been exhausted, the respondent's representations were referred by the Minister of Human Resources to the Industrial Court. The axis of the dispute between parties in that Court was whether the respondent had been, as alleged by him, dismissed without just cause or excuse or whether his discharge was within the exercise of the *bona fide* managerial power vested in the appellant as employer.

The Industrial Court, after hearing evidence of several witnesses came to the conclusion that the respondent was victimised for his trade-union activities. The Chairman of the Industrial Court was much impressed by evidence of circumstances which went to show that the appellant was attempting to find all sorts of reasons to evict the respondent from employment. I use the expression "evict" because the decision of this Court in *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 (where leave to appeal was refused by the Federal Court) and that of the Federal Court in *R. Rama Chandran v. Industrial Court of Malaysia & Anor*. [1997] 1 CLJ 147 which recognise that an employee's right to work and earn a living, apart from being a fundamental right, is also akin to property.

Before us, Sivabalah, with his usual meticulous care, has taken us through several passages in the testimony of the witnesses who gave evidence in the Industrial Court. He has attacked the learned Judge's refusal to issue *certiorari* on a number of grounds. I find it, however, unnecessary to delve into each of them. Suffice to say that the complaints made by Sivabalah amount to a criticism of the findings of fact made by the Industrial Court based upon the credibility of the witnesses it saw and heard.

It is well-settled that a Court cannot utilise *certiorari* proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact. If authority is needed for that proposition, it may be found in the decision of the Indian Supreme Court in *Basappa v. Nagappa AIR* [1954] SC 440 and in *Dharangadhra Chemical Works Ltd. v. State of Saurashtra & Others AIR* [1957] SC 264.

In response to this proposition, Sivabalah refers us to the decision of this Court in *Amanah Butler (M) Sdn. Bhd. v. Yike Chee Wah* [1997] 2 CLJ 79 and the decision of the Federal Court in *Rama Chandran (supra)*. I am conscious of the inroad made by these decisions in the field of administrative law. The principle they establish is that when a decision of an inferior tribunal is attacked in public law proceedings for unreasonableness, the inquiry extends to the merits of the decision itself.

The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *Rama Chandran* and *Amanah Butler (supra)* may be, it does not include the review, in *certiorari* proceedings, of findings of fact based on the credibility of witnesses.

We are therefore in agreement with learned Judge's refusal to enter upon a domain expressly reserved by law to the Industrial Court. The issue before that Court was whether there was a genuine retrenchment exercise *vis-a-vis* the respondent. Retrenchment means: "the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action" (per S.K. Das J in *Hariprasad v. Divelkar AIR* [1957] SC 121 at p. 132).

Whether the retrenchment exercise in a particular case is *bona fide* or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide.*

Having carefully read the award of the Industrial Court, I am satisfied that that tribunal did not traverse beyond the ambit prescribed by written law or by the principles established by the decisions of our superior Courts specifying its role in this area of human activity. I am satisfied that the Industrial Court asked itself the right question, that it took into account relevant facts and that it excluded from its purview all irrelevant considerations. In other words, it did not commit any "Anisminic error" in the sense in which I used that phrase in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748. On the contrary, I find the decision of the Industrial Court to be in accordance with law and meritorious.

In my judgment, the learned Judge is entirely correct in refusing to issue *certiorari*. For these reasons I find it unnecessary to call upon Loy Chee Say to respond to the arguments of Sivabalah.

I would therefore dismiss this appeal with costs, affirm the order of the learned Judge, direct that costs of the appeal be borne by the appellant and that the deposit be awarded to the respondent to account of taxed costs.

**Abu Mansor Ali JCA:**

I agree that this appeal should be dismissed for the reasons given by my learned brother.

**Denis Ong JCA:**

I concur.

*Reported by Alex KC Lee*